RAILWAY VALUATION—IS IT A PANACEA?

There seems to be a growing tendency in exalted quarters to regard the propaganda of railway valuation as a panacea for all the ills of the present railway situation, in so far as it involves the incidence of rates upon the shipping public. The physician of experience is prone to look upon a panacea with misgiving and to regard its sponsor as a quack. Perhaps, therefore, one may be absolved from a charge of treason if he proposes a merely academic analysis of the nostrum and an investigation as to its efficacy as a remedy.

The need of such a universal physic is the natural result of the attempt to confer upon commissions—Federal and State—the rate-making power. Judge Cooley, as a member of the Interstate Commerce Commission, characterized it as a "superhuman task" for that body to make the rates to govern the transportation of interstate commerce. Since that time the country's railroad mileage has steadily grown until now it totals the impressive figure of two hundred and twenty thousand miles. It is therefore manifest that there is sorely needed for the prompt despatch of this business a rule of thumb of easy application which shall serve as a criterion in all rate questions coming before the commissions.

Coupled with this need of the commissions, the very general superstition that under the guise of freight tolls the railways levy tribute on the public for the payment of dividends on watered stock, has contributed to the popularity of the new doctrine promulgated by our present-day statesmen. A general reading of the last compilation of Statistics of Railways[1] by our Interstate Commerce Commission would do much to dispel this superstition, and substitute in its stead a conviction that the shippers of this country are getting their transportation services without special reference to the nominal dollar capitalization of the railroads which furnish such services.

Reduced to its simplest terms the rule of thumb is to the effect that a railroad is not justified in adopting a schedule of rates which as a whole produces a revenue more than sufficient to defray the

[1]The statistics for 1905 show that in that highly prosperous year one-third of the outstanding stock of our railroads received no dividend return whatever, and that the remaining two-thirds received an average of less than six per cent.

running expenses and yield a "fair interest return upon the fair value of the property employed in the enterprise."[2]

This simple rule is a pitfall in itself, for it gives us no clue as to what is to be considered a "fair interest return." Shall it be less than the company defendant is obligated by contract to pay upon its bonds?[3] Shall it fluctuate with the money market?[4] Shall it be so fixed as to produce fairly uniform results in years of depression and prosperity.[5] Shall it be governed by the hazards of the undertaking[6] or based upon the conditions upon which governments can conduct such an enterprise?[7] These embarrassing questions indicate some of the fundamental difficulties at the outset; but in order that we may be perfectly fair to the doctrine in our discussion let us assume that a "fair interest return" at the present time could be conceded to be six per cent.

We shall find, however, that we have slurred over this difficulty only to be confronted by another. How shall we agree upon the "fair value of the property employed in the enterprise"? Shall it be based upon the outstanding capitalization? The whole populace shouts a negative in one loud chorus, and in this the Supreme Court agrees.[8] Shall the original investment control? It would if the government had built the lines from the proceeds of bond sales.[9] Can we give the railroad companies the benefit of the unearned increment and use the present value of the plant as a standard?[10] Or shall the fair return be computed upon the cost of reproducing the road in its present condition at present prices?[11]

[2]For discussion of the general proposition stated negatively and affirmatively see Reagan *v.* Farmers' Loan & Trust Co. (1893) 154 U. S. 362; Smyth *v.* Ames (1898) 169 U. S. 466; St. L. & S. F. Ry. *v.* Gill (1895) 156 U. S. 649.

[3]C. & N. W. Ry. *v.* Dey (1888) 35 Fed. 866.

[4]Steenerson *v.* Great Northern Railway (1897) 69 Minn., 353.

[5]*Re* Advance in Freight Rates (1903) 9 I. C. C. Rep. 382.

[6]Canada Southern Ry. *v.* International Bridge Co. (1883) L. R. 8 A. C. 723.

[7]Cotting *v.* Kansas City Stockyards Co. (1901) 183 U. S. 79.

[8]Dow *v.* Biedelman (1888) 125 U. S. 680; Smyth *v.* Ames (1898) 169 U. S. 466; see also Grain Shippers Ass'n. *v.* I. C. Ry. (1900) 8 I. C. C. Rep. 158; Danville *v.* Southern Ry. (1901) 8 I. C. C. Rep. 409.

[9]Brymer *v.* Butler Water Company (1897) 179 Pa. 231; Capital Gas Light Co. *v.* Des Moines (1896) 72 Fed. 829; Milwaukee E. R. & L. Co. *v.* Milwaukee (1898) 87 Fed. 577.

[10]San Diego L. & T. Co. *v.* National City (1896) 74 Fed. 79; Brunswick & T. W. Dist. *v.* Maine Water Co. (1904) 99 Me. 371.

[11]Steenerson *v.* Great Northern Railway (1897) 69 Minn. 353; Metropolitan T. Co. *v.* H. & T. C. R. R. (1898) 90 Fed. 683.

Let us ignore these puzzling questions, and in order to facilitate the discussion of the ensuing problems premise that a referee has in each case settled "the fair value of the property."

With these preliminary difficulties overcome, it may be conceded, for the sake of argument, that such a rule is of substantial assistance in determining the reasonableness of the rates of public service corporations whose operations are in their nature localized within a single jurisdiction, and whose activities are in other respects less complex than those of the great railroads. There is no difficulty in perceiving the possibilities of the direct application of such a recipe to questions involving the rates of a local water,[12] gas,[13] or traction company,[14] a warehouse enterprise,[15] or stockyards business.[16] In those cases the problem is relatively simple, there is no separation of business into state and interstate, and the defendants are purveyors to a single given locality, furnishing an ascertainable number of units of fairly uniform character to the various patrons in the locality. In one case it is transportation at a flat rate, in another gallons of water, and in another cubic feet of gas. After the filing of the referee's report as to the "fair value of the property devoted to the public use" in such cases, and making allowance for running expenses and depreciation, it needs only the application of the multiplication table, using our agreed six per cent. as the multiplier, to arrive at a conclusion as to the reasonable total revenue to be allowed a defendant company. Then to learn whether an individual rate is reasonable it is only necessary to divide the total revenue by the total number of units sold within the period under investigation. The quotient represents the reasonable rate and if the prevailing rate is higher it can be reduced so as to conform to that quotient without resulting in confiscation within the meaning of the Federal constitution.

It is true that the foregoing is a rather roseate description of the simplicity of such cases, as one can learn from a perusal of the paper book in the gas litigation now pending in this city; but granting the usefulness and simplicity of the rule in these cases does it warrant the hope that it can be practically invoked in the solution of present-day rate problems as they actually arise on the

[12]Brymer *v.* Butler Water Co. (1897) 179 Pa. 231.

[13]Consolidated Gas Co. *v.* Mayer *et al.*, now pending.

[14]Milwaukee E. R. & L. Co. *v.* Milwaukee (1898) 87 Fed. 577.

[15]Munn *v.* Illinois (1876) 94 U. S. 113.

[16]Cotting *v.* Kansas City Stockyards Co. (1901) 183 U. S. 79.

great railroad systems of this country? The theorists say it can, and perhaps it can. It may be profitable to examine, from the standpoint of preparation for trial, three cases, involving railroad rates, and seek in that manner to ascertain the real contribution to practical results afforded by the rule.

In the first two cases we shall assume the railroad or railroads to be located entirely within the boundaries of a single State and physically disconnected with any other railroad so that the traffic will be necessarily confined to intrastate business. This assumption will greatly simplify our consideration of the cases, by eliminating any conflict of jurisdiction and many difficulties of accounting.

The first case results from a request to prepare for the defense of a so-called two-cent-fare law, which has been attacked by one of the railroads of the hypothetical State, on the ground that it is confiscatory and therefore unconstitutional. We find the simple rule and begin the preparation with enthusiasm. The defendant railroad has reported its *gross passenger revenue* under oath to the State taxing authorities. The referee has reported on the fair valuation of the entire railroad system. We are almost ready to multiply something by six when it suddenly occurs to us that we have not separated the passenger business from the other business of the railroad except in the matter of gross receipts. Two questions loom large. What is the value of the portion of the property of the railroad devoted to the passenger business? How much of the total annual disbursements of the company are to be attributed to the conduct of passenger transportation?

It is, of course, fundamental that the freight business and passenger business must be considered separately in such cases and segregated.[17] One would anticipate that the method for making the necessary segregation of the two forms of business had been worked out in detail by the sponsors of the panacea. But they have neglected this detail. It is, of course, a simple matter to classify such items of investment as passenger stations, cars and engines, and such items of daily expense as the wages of ticket sellers and passenger train crews; but it is impossible to say what part of the investment in right of way, bridges, rails and ties, and what part of the annual expenditure for their maintenance should

[17]Chief Justice Mitchell of the Supreme Court of Pennsylvania, in the prevailing opinion in Pennsylvania R. R. Co. *v.* Philadelphia County, Case No. 346, announced January 20, 1908, and not yet reported; but see also the dissenting opinions of Mestrezat, Potter and Stewart.

be charged to the passenger business. The freight trains and the passenger trains both use the same right of way and tracks, are moved by the same dispatchers, use the same set of block signals, and the two branches of the business are in the main conducted by the same general officers. Railroad experience indicates that while about two-thirds of the annual expenses of a railroad can be definitely allotted to the proper branch of the service, the other one-third cannot be definitely assigned exclusively to the one branch or the other.

Various methods have been adopted by various railroads and commissions for arbitrarily making such an assignment. Some divide the unassignable disbursements in the ratio indicated by the gross revenues of the two branches of the business, others on a "wheelage" basis, and still others on the basis of locomotive mileage. The Interstate Commerce Commission has manifested its preference for a division in the proportion which the respective train mileage bears to the total mileage of train earning revenue. Without explaining the various methods in detail, it is obvious that the result must depend upon the method adopted and that each method is arbitrary. It is quite as obvious that each side in a litigation will adopt the method which will make the best showing in support of its contentions, and that neither will be able to give any logical reason for the basis adopted. The Interstate Commerce Commission's rule of division was urged by distinguished counsel in the most recent litigation, involving the question in our neighboring State of Pennsylvania, and seems to have been adopted by Judges Wilson and Audenried as the basis of their decision,[18] and approved by the State Supreme Court on appeal.

The learned Attorney General, nevertheless, objected that the adoption of such a method invited the court to leave the domain of fact, where it has to guide it the testimony of witnesses who have seen the things that they describe, and to enter the realm of speculation, where all evidence is mere guesswork and where probability is the nearest approach to reality and truth that can be found. These are strong words of condemnation, but the utterly vague and nebulous state of the law on the point, and the absence of any fixed or definite principle of division seem to warrant the criticism. Is it fair for the sponsors of such a "half-baked" rule to make such extravagant claims in its behalf and subject the prop-

[18]Penn. R. R. Co. *v.* Philadelphia County, Case No. 5312, March Term 1907, Court of Common Pleas, No. 4, County of Philadelphia.

erty of railroad security holders to attack with no better test of confiscation than that to be derived from use of such a formula? It is almost useless in determining the reasonableness of the entire rate schedule for either of the great divisions of a railroad's business—passenger or freight—because it is impracticable under present conditions to entirely separate the one branch from the other and so make possible the application of the recipe.

The second case may be well illustrated in an attempt to use the fetich in order to determine the reasonableness of a single rate, as for example the carload rate on wheat from Buffalo to New York. Given a referee's valuation of each of the half dozen trunk lines at a figure different from the other five, and a report as to the annual expenses and revenues of each line varying in the same manner (as would necessarily be the case), we do not need the experience of litigation to assure us that the rate would not be different on any one line from what it was on all the others. The one element of competition would prevent any application of the theory discussed in the introductory paragraphs of this article. But such a case aside, it is so apparent as to be axiomatic that such a formula is of no practical use in determining how a reasonable aggregate revenue of a company should be distributed among the nine or ten thousand articles of commerce moving in railroad traffic in shipments varying as they do one from another in value, bulk, risk of carriage, weight, distance carried, expense of handling, volume of traffic, and numerous other characteristics influencing the rate.[19]

These two cases indicate that the scope of the proposed test is limited to those cases where the reasonableness of the total revenues of a carrier or the rate schedule as a whole is called in question. Such a criterion would justify its existence, however, if it served as an accurate administrative guide to State and Federal Commissions in their considerations of the rate schedules as a whole. Will it prove of service even in that limited sphere under existing conditions of conflict of jurisdiction between State and Federal govern-

[19]On the numerous, varying, and complex features considered as influencing the determination as to the reasonableness of single rates, see Delaware State Grange *v.* N. Y. P. & N. Ry. (1891) 3 Int. Com. Rep. 554; Grain Shippers *v.* Illinois Central R. R. (1899) 8 Int. Com. Rep. 158; *Re* Rates upon Food Products (1890) 3 Int. Com. Rep. 93; C. & G. T. Ry. *v.* Wellman (1892) 143 U. S. 339; T. & P. Ry. *v.* Interstate Commerce Commission (1896) 162 U. S. 197; L. S. & M. S. Ry. *v.* Smith (1899) 173 U. S. 684; Union Pacific Ry. *v.* Goodridge (1893) 149 U. S. 680; *Re* Advances in Freight Rates (1901) 9 Int. Com. Rep. 382.

ments? Let us seek to apply it to the Pennsylvania Railroad running as it does through a dozen States. Assume that each of the States and the Federal Commission have adopted elaborate rate schedules to govern that portion of the company's business within their respective jurisdictions. The company regards each and all of these schedules as confiscatory. A referee in each State has reported on the fair value of the company's property physically situated in that State. The total is a mere matter of addition. It is manifest, however, that the Federal Commission cannot regard the property represented by this total valuation as devoted to the conduct of interstate commerce, even though that be true in the physical sense, because the portion of that property geographically located in Pennsylvania or New York is also used for the conduct of business entirely within the boundaries of those States, respectively, and is to that extent subject to the legislative control of the State where it is situated. The puzzle then is to make a fair division of the entire property of the railroad for jurisdictional purposes between the Federal authority on the one hand and the various States on the other. To take a concrete case, upon the completion of the company's new hundred million dollar terminal on Manhattan Island, what portion shall be regarded as devoted to intra-state business and what portion to interstate business? "For some purposes its property in this State is separate and distinct from its property elsewhere, and out of this property within this State, it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction."[20] This division must be made, for the Supreme Court has held that the rates for such transportation as begins and ends in a State must be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it.[21]

In the case of this great terminal last mentioned it is clear that, while located in the State of New York, no use of it is made in intra-state business, and that the State Commission would be correct in rejecting it in its calculations as to the reasonableness of a schedule of State rates. Passing over the river to the State of

[20]Brewer, J., in Chicago and Northwestern Ry. *v.* Dey (1888) 35 Fed. 866.

[21]Smyth *v.* Ames (1898) 169 U. S. 466.

New Jersey, however, the problem of apportioning this great six-track highway between intra-state and interstate business becomes more perplexing. What proportion of the fair value of this property lying between the Delaware and Hudson Rivers, and what proportion of the annual expenses for taxes, operation and maintenance of ways, structures, bridges and equipment shall be borne by the intra-state business, and what proportion by the interstate business? No one, unless inspired, could say. It would be an unanswerable question even if intra-state trains were run separately from interstate trains, but when one considers that practically every freight train carries both State and interstate shipments, it is apparent that it is simply impossible to say how much of the ties and rails are worn out by each kind of business, or how the cost of labor and fuel employed in the train movement should be divided between the two. Precisely the same insurmountable difficulty prevents any division of disbursements for taxes, insurance, station costs, general office expenses and every other item of outgo. It is a comparatively simple matter to divide *revenue* on the basis of State lines, but it is absolutely impossible to thus divide *disbursements*. Traffic men and accountants may take the stand and testify as to their opinion as to arbitrary divisions of these items of expense, but their testimony must start with and proceed on the assumption of facts which cannot in the nature of things be established. In a nutshell, it seems obvious that the panacea cannot be administered in these cases because it is impossible for any man or set of men to determine the fair value of the property devoted to the business—State or interstate, as the case may be.

With any such rule—or alleged rule—in the hands of State commissions, animated, as many of them are at the present time, by the corporation-baiting spirit, it is easy to see that the owners of railroad securities would be helpless against the piecemeal dissipation of their property if it traversed more than one State, thus necessitating an attempt at a valuation of the railroad devoted to State business and a separate valuation of that devoted to interstate business.

In the three cases considered we have found the proposed formula of no practical value in the solution of the problems because as a condition precedent to the application of that formula it became necessary to divide something which in the nature of things was indivisible. In the first two cases the difficulty is insurmountable. In the third case the difficulty arises from the necessity

of a division by reason of the conflict of jurisdiction between the States and the Federal Government. If the jurisdiction could be lodged in the latter, the questions involving the reasonableness of a railway rate schedule as an entirety would become at least as simple as the corresponding questions involving the reasonableness of the rates of gas, water, and traction companies. This would eliminate the necessity for the impossible attempts at segregation last above discussed, and enable the Interstate Commerce Commission to treat the whole rate schedule of a single railroad as a unit. It would likewise greatly increase the value of a rule now practically valueless in railway rate cases.

This can only be accomplished in one of two ways; either by formal constitutional amendment, or by the sort of constitutional "construction" recently advocated by our Secretary of State. In the light of the violent strife engendered in the Southern States during the past year, by alleged encroachments of the Federal courts upon the prerogatives asserted by the State authorities, there seems to be little prospect of a surrender of jurisdiction through the instrumentality of a formal amendment to the Constitution. On the other hand, there are growing indications of a disposition on the part of Congress and even of the Supreme Court to so "construe" the Constitution as to make it not improbable that they would countenance the assertion by the Interstate Commerce Commission of a jurisdiction over all the rates of railroads engaged in interstate commerce, whether the rates are imposed upon an intrastate or an interstate movement. This would leave the rates of railroads not engaged in interstate commerce subject to the jurisdiction of their respective State authorities, and the rate schedules of such railroads could be treated in their entirety by those authorities. These instances would be very rare.

This tendency to thus "construe" the Constitution may be observed in recent Congressional legislation and decisions of the Supreme Court. It requires but slight circumstances, such as a through billing for example, to induce the view that, although a local carrier confines its share of the carriage to a single State, it is nevertheless engaged in interstate commerce, and the rates for such carriage are subject to the jurisdiction of the Interstate Commerce Commission if it *participates* thus in the carriage of goods through to a destination in another State.[22]

[22]Norfolk & Western R. R. *v.* Pennsylvania (1890) 136 U. S. 114; Cincinnati, N. O. & T. P. Ry. *v.* Int. Com. Com. (1896) 162 U. S. 184.

The same underlying principle seems to have controlled the Supreme Court in their recent decisions upon the so-called "Safety Appliance Act,"[23] which followed logically would indicate the conclusion that the national power to regulate commerce is broad enough to regulate the employment, duties, obligations, liabilities, and conduct of all persons engaged in interstate commerce. If it can reach such details of operation, why should it hesitate to regard the entire rate-schedule of a great trunk line railroad as an instrumentality of interstate commerce, no matter what its local ramifications? Upon what less comprehensive principle could the Supreme Court have twice enforced the "Safety Appliance Act," undisturbed by a doubt of its constitutionality?[24]

Congress, the legislative branch, has adopted its own interpretation of its powers to legislate concerning the conduct of interstate commerce. In days gone by the power was sparingly exercised, but in more recent times there has been a growing tendency on the part of that body to exercise the power in various and numerous acts which have been spread upon the statute books. Thus the last amendment to the so-called Interstate Commerce Act requires not only the publishing and filing of interstate rates, recognized as such, but also that short intra-state roads must likewise publish and file all their "separately established rates, fares, and charges *applied to* the through transportation."[25] The same amendment also seeks to control such local affairs as terminal charges, storage charges, icing charges, and the terms to govern the construction and operation of private side-track connections with local industries. Other acts have provided drastic regulations as to the care of live stock[26] and prohibitions against the transportation by railroads of live stock affected with contagious diseases.[27] Similar legislation has been enacted prohibiting interstate transportation of carcases, and meat-food products which have not been inspected in accordance with the requirements of the act.[28] Perhaps the most interesting laws, however, are those seeking to regulate the relations of master

[23]Act of Congress March 2d, 1893, c. 196 (27 Stat. 531); Act of Congress March 2d, 1903, c. 976 (32 Stat. 943).

[24]Johnson *v.* Railroad (1904) 196 U. S. 1; Schlemmer *v.* Railroad (1906) 205 U. S. 1.

[25]Section 6 of the Act to regulate commerce as amended June 29, 1906 (34 Stat. 584).

[26]Act of June 29, 1906 (34 Stat. 607).

[27]Act of May 29, 1884, c. 60, § 6 (23 Stat. 31, 32).

[28]Act of June 30th, 1906 (34 Stat. 669, 674, 676).

and servant, and create an entirely different tort liability on the part of a "common carrier engaged in * * * commerce, * * * between the several States * * * etc.," toward its employees than that which prevails between other employers and employees.[29] The so-called "Safety Appliance Acts" and their amendments show the same general tendency.[30] Another very interesting series of acts are those like the Erdman law,[31] or of the same general trend, governing contract relations between employers engaged in interstate transportation and their employees, regulating the hours of labor,[32] and enforcing the arbitration of disputes.[33] Because Congress takes this ambitious view of its powers does not necessarily indicate that the Supreme Court will concur in that view. Sometimes they do,[34] sometimes they do not.[35] It does indicate, however, that the law-making branch of the government feels that it has a mission and is willing to embark on any number of experimental voyages of discovery. It probably represents the trend of popular thought on the subject, and our judges, being merely human, will be more and more influenced (unconsciously, perhaps) by that undercurrent of opinion.

That the views of the Interstate Commerce Commission and our national legislators are finding lodgement in the minds of the judiciary may be inferred from a reading between the lines of two of our recent Supreme Court decisions. One of these cases involved the constitutionality of articles 4497 to 4500 of the Revised Statutes of Texas, the material requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated, within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the latter failing to furnish cars shall forfeit $25 per day for each car not so furnished. The plaintiff in the case sought to recover a penalty under this statute by reason of the defendant

[29]Act of June 11th, 1906 (34 Stat. 232).

[30]Act of March 2d, 1893 (27 Stat. 531); Act of April 1, 1896 (29 Stat. 85); Act of March 2d, 1903 (32 Stat. 943).

[31]Act of June 1, 1898 (30 Stat. 424).

[32]Act of March 4, 1907 (34 Stat. 1415).

[33]Act of June 1, 1898 (30 Stat. 424).

[34]Johnson *v.* Railroad (1904) 196 U. S. 1; Schlemmer *v.* Railroad (1906) 205 U. S. 1.

[35]Howard *v.* Railroad (1908) 207 U. S. 463; William Adair *v.* The United States, Case No. 293, October Term, 1907, United States Supreme Court. Decided January 27, 1908.

company's failure to furnish fifteen stock cars for an interstate shipment of cattle. The Texas Court of Civil Appeals supported the argument of plaintiff's counsel that the transaction was local in its character and disconnected with interstate commerce, as it preceded any delivery of the cattle to the carrier and its receipt of them for transportation on an interstate journey. It upheld the act as a proper exercise of the police power of the State.

Mr. Justice Brown[36] of the United States Supreme Court took a different view of the question, when the case came before that tribunal. He said:

"The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. * * * The validity of local laws designed to protect passengers or employees or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. * * * While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers * * * we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and *amounts to a burden upon interstate commerce.*"

In the other case[37] the Southern Railway had had a dispute with one of its patrons over demurrage charges, and in consequence gave notice to the patron that after a given date it would cease to make delivery of freight upon the patron's private spur siding and would tender delivery of future consignments on the company's public team track. After receipt of this notice the patron ordered four cars of coal from neighboring States which upon their arrival the railroad company placed upon their public team track, and there tendered delivery. This delivery was declined and a delivery upon the private spur siding demanded by the patron, and this demand was followed by complaint to the State Commission, which ordered the railway company to make delivery of the cars on the siding referred to. The company declined to obey the order and also sought to enjoin the Commission from bringing any action to recover the statutory penalties incurred by such disobedience.

The third question involved in the case was whether the order of the State Commission and the statutes on which the same was based were void because in conflict with the commerce clause of

[36]Houston & Texas Central Railroad Co. *v.* Mayes (1905) 201 U. S. 321.
[37]McNeill *v.* Southern Railway Company (1905) 202 U. S. 543.

the Constitution and the act of Congress to regulate commerce. The Supreme Court held that they were. Mr. Justice White said:

"It is certain that any regulation of such subject made by the State or under its authority *which directly burdens interstate commerce* is a regulation of such commerce and repugnant to the Constitution of the United States. * * * the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. * * * the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

The foregoing cases are not introduced as illustrating any underlying principle of law, but rather as indicating the extent to which the Federal courts will practically go toward bringing under their jurisdiction questions which seem to be purely local in their nature—matters preceding or succeeding the movement of goods in interstate commerce quite as distinctly, it would seem, as their manufacture or their sale. Will not the distinct trend of these courts in future be toward regarding almost every conceivable State regulation as being a *burden upon interstate commerce?* It seems highly probable.

For example, the recent two-cent passenger fare law of Pennsylvania required the Pennsylvania Railroad to make its rate from Pittsburg to Philadelphia (the intermediate route lying entirely within the State) two cents per mile for the total distance. The inevitable result was that the Baltimore and Ohio Railroad was compelled to make precisely the same rate, although its route between these two points is interstate—traversing as it does the states of Pennsylvania, West Virginia, Maryland, and Delaware and the District of Columbia. This is not a sporadic example, but on the contrary is typical of what happens whenever a State prescribes a schedule of rates for intra-state business. Will it come to be regarded as burdening interstate commerce?

The Hepburn Bill conferred upon the Interstate Commerce Commission the rate-making power, and about a year ago the Commission announced that it would consider a through rate, which was higher than the sum of the locals between the same points, as *prima facie* unreasonable.[38] From this it results that for such time as the Ohio and Pennsylvania two-cent fare statutes remained in force those States were fixing the interstate rate between Cin-

[38]Interstate Commerce Commission Tariff Circular No. 6-A, November 16, 1906.

cinnati, Ohio, and Philadelphia, Pennsylvania, at two cents per mile for the seven-hundred-mile journey. Would not this directly affect and burden interstate commerce?

As a result of the Pennsylvania law the intrastate rate from Pittsburg to Philadelphia via the Pennsylvania Railroad must be two cents per mile. The rate from Pittsburg to Camden, New Jersey, just across the river from Philadelphia, being an interstate rate, might be three cents per mile in the absence of other complications. The first complication is a practical one—all sensible passengers would purchase a local ticket for the trip within the State and buy a ferry ticket to complete the interstate trip across the river. The second complication is the Interstate Commerce Commission's tariff circular above noted which makes the reasonable rate *prima facie* the sum of the locals. A third complication is that to make such a discrimination in rates between Pittsburg and Philadelphia on the one hand, and Pittsburg and Camden on the other would constitute a glaring violation of that section of the Interstate Commerce Act inhibiting discrimination against localities. The State rate cannot be increased; the inevitable result will be that the interstate rate must be decreased. But such an influence does not cease there, it goes on and on disturbing other rates dependent thereon, to the remotest points to which railroads run. The New York State Commission by lowering the *intrastate* grain rates over the New York Central Railroad from Buffalo to New York, would not only affect the *interstate* rates in force on competing lines, such as the Erie and Lackawanna, which in connecting those two cities traverse other States than New York, but would inevitably affect the interstate grain rates from the Missouri River territory to the Gulf ports, and probably from points in the far West to Pacific ports. Such a rate order would naturally and inevitably amount to a burden upon, and an interference with, interstate commerce. Indeed, it would certainly present a more striking instance of direct interference than the cases on car-service regulations decided by the Supreme Court and already discussed.

If any practical end were served by dividing the jurisdiction over rates between the Federal Government and the fifty State sovereignties the resulting perplexities might be tolerated, but the interests of the States are so slight as to be negligible. During the past year the writer had occasion to use the testimony of several traffic experts as to the ratio of intrastate to interstate traffic in the State of New Jersey. Owing to the inherent complexities of the

question no reliable statistics were available, but the consensus of expert opinion was that the intrastate business did not exceed three per cent. of the whole. In view of this practically negligible percentage it does not seem improbable that the Supreme Court may progressively hold, first, that the Federal commission has exclusive jurisdiction over such intrastate rates as affect even remotely interstate rates, and second, that the rate schedule of any interstate railroad shall, in its entirety, be regarded as an instrumentality of interstate commerce, much as its equipment would be under the doctrine of the *Johnson* case cited above.

On broader grounds one of our Federal Judges has prophesied[39] the practical exclusion of State commissions from the field of rate-making by the gradually legalized encroachment of the Interstate Commerce Commission without the aid of a constitutional amendment. Among other things he said:

"In commerce, as in politics, State governments will represent State interests. * * * The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce. * * * Localism is to speak not by petition, but by statute. Under this regime as governmental control increases in efficiency, the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition and the intensity of the passions aroused. Such a conflict must in the end result in the complete supremacy of one authority or the other. * * * How far may the national government go in the control of those matters which have become in fact national? * * * It presents a case to which the separate States are incompetent and in which the harmony of the United States may be interrupted by the exercise of individual legislation! * * * As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. * * * The railroad is a unit, its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. * * * Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. * * * If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the Federal Government may assert and maintain its exclusive jurisdiction. * * * The subject is national, and the Federal Government with its national outlook can

[39]Address on "The Nation and the Constitution," delivered at the thirtieth annual meeting of the American Bar Association by Hon. Charles F. Amidon.

by organized investigation and accumulated experience acquire the skill and knowledge necessary for the just and efficient regulation. * * * A uniform authority in the field of interstate commerce and industry will be found as beneficent to-day as it was discovered to be in the field of finance and banking as the result of our first economic conflict. * * * We ought to look squarely at the nature and extent of our commerce and industry. Are they national? Ought they to be regulated by one or by fifty different sovereignties? If in their nature and extent they are national and * * * ought to be subject to a single authority, then we ought not to hold back from the exercise of the necessary power simply because it would add to the activities of the Federal Government."

If impressed by the foregoing doctrine and recognizing each railroad system as a unit, courts adopt a construction of the Constitution logically applicable to the situation, and decide that Federal jurisdiction over interstate commerce carries with it as a corollary control over all the rates of a railroad engaged in such interstate commerce, considerable progress will have been made in the simplification of the rate question. Then the principle under discussion will become of real value in the consideration of such questions. It will be a sword in the hands of the government and a shield in the hands of the railroads of the land. In the nature of the case the result will not even then help in the solution of the first or second problem considered in this discussion. Indeed, wherever the necessity for attempting impossible divisions of earnings and disbursements is involved the fetich loses its potency. It is only when the necessity for such divisions is eliminated that the panacea may be administered with anything like sure results. Even in the simplest of such cases the complexities of the railroad rate problem will dispel the illusion that such a formula can be applied with the same facility as in cases involving the rates of gas, water, or traction companies.

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